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## THE LAW AND LAWYERS OF SIR WALTER SCOTT.

(Continued from the May number.)

*The Heart of Mid-Lothian*, that great prose drama, marred only by its strange anticlimax (for Scott was generally artistic enough to stop when he was done) is replete with interest to the lawyer. Jeanie Deans is one of the greatest heroines of fiction—yet not of fiction, for she really lived as Helen Walker; and Scott truly says, “in the State Trials or in the Books of Adjournal, every now and then you read new pages of the human heart and turns of fortune far beyond what the boldest novelist ever attempted to produce from the coinage of his brain.”

The story is familiar. Effie Deans was indicted under the Statute of 1690, c. 21, which in case of child murder, enacted that certain facts should constitute legal presumptions of guilt, to wit: the concealment by the mother of her condition, and the death of the child or failure to produce it. The Act was passed apparently upon the suggestion of the Court *Re Smith*, (1679;) 1 Fountainhall, 47, who referred with favor, to the English Statute 21 Jac. I. c. 27, on the subject; and though afterwards modified in practice, the law was not repealed until 1803.

Passing over the preliminary examination of David Deans, and that wonderful and pathetic scene between Jeanie and Effie, on the eve of the trial,—Scott never wrote a stronger chapter—we come to the trial itself. Scott disclaims the ability to describe the forms of a Scottish criminal trial so accurately as to abide a lawyer's criticism, but we must assume that this statement was intended to disguise his authorship, then anonymous, \*and that his account is technically correct.

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\*An anonymous writer, however, evidently an English lawyer, in 5 Law Review 44 (1846), severely criticizes Scott for his inaccuracy in legal allusions, particularly in his account of this case.

Scots law, more liberal than the English, allowed counsel to the panel or defendant, and Effie's attorney was Mr. Nichil Novit, her advocate was Mr. Fairbrother. According to the practice in Scotland, the witnesses were "enclosed", or separated from all information of what was passing, and called into court when their testimony was desired. The writer has seen this practice followed in Jamaica, even in a civil case. When the court opened, Effie, between two sentinels, with bayonets, was arraigned to the indictment; she pleaded not guilty and both counsel addressed the court, speaking to the indictment and the defence, viz. that the prisoner had communicated her condition to her sister. The court then pronounced the indictment and the defence relevant and the jury was empanelled; the prisoner again pleaded, and then the witnesses were heard. It will be noted that in Scotland the accused is subjected to a preliminary examination. He may refuse to answer, but if he answers, the record of the examination may be used as corroborative evidence against him at the trial. Effie's declaration, accordingly, is read in full. Her counsel first offered proof of character and then called Jeanie as his principal witness. She was sworn and certain formal questions were put to her, including "whether any one had instructed her what evidence she had to deliver." It seems possible from this, that in the Scottish practice counsel are not at liberty to confer personally with their witnesses, for Fairbrother to his great mortification, when he puts the crucial question, receives the reply that Effie had said nothing to her. This ruins the case, for Fairbrother can do nothing but argue as to the legal effect of the prisoner's declaration, as to which he cites learned authorities, laying stress on the highly penal nature of the statute.

The Court charges the jury, who retire for conference; upon their return, they render a sealed verdict, a lighted candle is extinguished and the verdict of Guilty with a recommendation to mercy is read. The Court, in pronouncing sentence, calls the Doomster, a tall haggard figure, dressed in a fantastic garment of black and grey,

to repeat the sentence of death, and he adds the words, "And this I pronounce for Doom."

But there is another vein in *The Heart of Mid-Lothian*. Indeed this masterpiece contains many illustrations of the close connection of tender sympathy and genuine humor. Bartoline Saddletree—called Bartoline perhaps after Bartolus, a learned Doctor of the Law, or perhaps after Bartolinus, another less celebrated Jurist, is an amateur lawyer, who throughout the story freely gives his opinion upon all legal questions. His favorite book was Balfour's Practiques, his genius lay towards the weightier matter of the law, and he regularly attended the courts to the great neglect of his business, which Mrs. Saddletree conducted, a lady well qualified by nature and experience to assume at a moment's notice the leading soprano role in the matrimonial duet. Bartoline indeed was like a Territorial Delegate in Congress, permitted to talk but not to vote. His conversation is always interlarded with legal terms, he discusses in a masterly way the guilt of Captain Porteous of whose case Scott gives a full account; and explains to Mrs. Saddletree the theory of legal presumption in Effie's case. "The crime is rather a favorite of the law, this species of murther being one of its ain creation." "Then if the law makes murders," said Mrs. Saddletree, "the law should be hanged for them; or if they wad hang a lawyer instead, the country wad find nae faut."

His account of the pleadings in Marsport vs. Lackland, is unfortunately too long to quote; but we must notice his remark that the better the pleadings the fewer understand them, and his cold-blooded criticism of lawyers' fees: "After a', its but the wind of their mouth, it costs them naething, whereas in my wretched occupation of a saddler, we are out unconscionable sums just for hides and leather"—Nor should we overlook the case of Crombie vs. MacPhail, involving the law of stillicide or easement of dripping water. Mrs. Crombie owned the inferior tenement, "obligated to receive the natural water drap of the superior tenement, sae far as the same

fa's frae the heavens on the roof of the neighbor's house and from thence, by the gutters or eaves upon the inferior tenement. But the other night comes a Highland quean of a lass and she flashes God kens what out at the east-most window of Mrs. MacPhail's house—that's the superior tenement. I believe the auld women wad hae agreed, for Luckie MacPhail sent down the lass to tell my friend Mrs. Crombie that she had made the gardyloo out of the wrang window out of respect for twa Highland gentlemen, that were speaking Gaelic in the close below the right one. But, luckily for Mrs. Crombie, I just chanced to come in in time to break aff the communing, for it's a pity the point suldna be tried. We had Mrs. MacPhail into the Ten mark Court. The Hieland limmer of a lass wanted to swear herself free—but haud ye there, says I"—Unfortunately here Saddletree is interrupted and we shall never know whether he was able to have this delicate question of easement settled by the Court.

That sombre and fateful tragedy, *The Bride of Lammermoor*, is drawn from the family history of James Dalrymple, who, as Lord Stair, was one of the most conspicuous figures in Scottish jurisprudence. His daughter had engaged herself without the knowledge of her parents and was compelled by them to marry the suitor of their choice, with the fatal results closely copied by Scott in his novel.

Edgar, the Master of Ravenswood and Lucy Ashton, likewise become betrothed in secret and she, it seems, was under age. Sir William Ashton her father, a lawyer, was Lordkeeper, a politic, proud, wary and timid man, who had come into possession of the ancestral estates of the Ravenswoods by means of certain transactions with the old Lord, Edgar's father. While it is not clearly stated, he had apparently advanced money to Ravenswood and had taken technical, though legal advantage of non-payment, to obtain decisions of the Scottish courts in his favor. These judgments, however, were open to attack in the British House of Lords, upon equitable

grounds, and Ravenswood was encouraged to appeal by his kinsman and patron, the Marquis of A—

The engagement of Lucy was repudiated by her parents upon the authority of the Levitical law, as stated in the 30th chapter of Numbers, to the alleged effect that a woman is not bound by a vow, from which her parents dissent. Ravenswood leaves the country upon a mission for his patron, the Marquis; Lucy, under command of her mother, writes to break her engagement, no answer is received, the day appointed for her marriage to Bucklaw is fixed, and finally arrives. Just too late, as the marriage contract is signed, Ravenswood appears, and to him the Reverend Mr. Bide-the-bent reads the text upon the authority of which he had declared the nullity of the prior engagement. "If a woman vow a vow unto the Lord and bind herself by a bond being in her father's house in her youth; and her father hear her vow and her bond wherewith she hath bound her soul, and her father shall hold his peace at her; then all her vows shall stand, and every vow wherewith she hath bound her soul shall stand. But if her father disallow her in the day that he heareth; not any of her vows or of her bonds wherewith she hath bound her soul shall stand; and the Lord shall forgive her, because her father disallowed her."

In *Ivanhoe*, we pass over Scott's references to the Forest laws; the legal status of the Jews temp. Richard I, and other topics, incidentally mentioned, until we reach the trial of Rebecca for sorcery, in the conclusion of the book. Bois Guilbert had rescued Rebecca from the blazing castle, and brought her to the Templar's Preceptory of Templestowe, with the connivance of Malvoisin the Preceptor. Beaumanoir, the Grand Master, making an unexpected visit, is induced to believe that Rebecca had bewitched Bois Guilbert by her magical art, and the Grand Master at once asserts his power and intention to try Rebecca for witchcraft.

The trial is conducted by the Grand Master with elaborate ceremonial. He refers to the rules of the Templar

order, as stated by St. Bernard, recites their infraction by Bois Guilbert, especially the chapter "Ut fugiantur oscula," and attributes his fall to Rebecca's witchcraft. Rebecca, interrogated in her defence and acting upon the secret suggestion of Bois Guilbert, demands a trial by combat, and throws down her glove which is given to Bois Guilbert, appointed to do battle in behalf of the Order; all of which is engrossed at length in the official minutes of the Chapter. The trial by combat is appointed for the third day and Rebecca sends word to Isaac of York to send Ivanhoe to be her champion. Upon the fateful day, the lists are ready and all the preparations described by Scott, with his usual zest. Ivanhoe, of course, gallops up at the psychological moment, and the Grand Master throws Rebecca's glove into the ring with the fatal signal words, "Laissez aller;" or as we might say, "Let her go!" After the combat and the Templar's death, King Richard appears. Malvoisin is arrested on a charge of treason and the Templars, Grand Master and all, are expelled from their castle.

What powers the Knights Templar arrogated to themselves in England, and what jurisdiction they assumed to try and condemn persons who were not members of their order, are questions which Scott does not attempt to answer, and we are in the position of the Scotch minister who, when asked what he did when confronted by difficult theological problems, replied, "I look them straight in the face and pass them by."

In *The Monastery* Scott, in speaking of the rural superstitions concerning fairies, mentions a case which came before him as sheriff, in which a shepherd mistook the figures in a Punch and Judy show for the "Good neighbors." He also refers to the old feudal rights of the Church in Scotland, and the obligation of tenants to have their corn ground at the mill of the barony, and using the technical phrases of *intown* and *dry multures* and *thirlage invecta et illata*, intimates that he talked not without book;

nor does he hesitate to quote a sentence from the Decretals.

In *The Pirate*, Scott refers to the trial of Gow, the pirate, before the Admiralty Court in 1725, where Gow refused to plead, thereupon the court ordered his thumbs to be squeezed with whip cord as a mild preparation for the *peine fort et dure*; upon which the pirate finally consented to bring himself within the jurisdiction of the court. Scott notices the Udallers or allodial possessors of the land in Zetland where the Norwegian law prevailed, and the scat and wattle, hawkhen, and hagelef or dues from the peasants to the lords. He refers to the law of wreck, to Flotsam and Jetsam, to the right of property in a stranded whale, and to Treasure trove, though all his statements are not entirely in agreement with the English law.

In *The Fortunes of Nigel*, the hero is about to lose his estates by eviction, under an overdue Wadset, which is the attractive name of a Scotch mortgage. He came to London to ask of King James I the repayment of a large sum, which that monarch had borrowed of Nigel's father. As that wisest fool in Christendom was not such a fool as to pay his royal debts before he was reminded of them, the sympathetic aid of his banker, the celebrated George Heriot, was enlisted. James then pledges his jewels to Heriot for an immediate advance of cash to Nigel for his present benefit, gives him directions to negotiate a loan to clear Nigel's mortgage and signs his royal warrant in addition as security. Heriot repledges the jewels to old Trapbois, the usurer, for the cash and obtained from the Lady Hermione money to pay off the mortgage or rather to procure an assignment of it, for it would seem that the mortgagee when given the money could be required to assign.

Meantime, Nigel having fought with Lord Dalgarno, his false friend, in St. James Park, within the verge of



the court, committed a breach of privilege—a Star Chamber business, he was told, which might cost him his right hand; so he fled to Whitefriars near the Temple, so called from the church of the Carmelites or Whitefriars. This precinct was known by the cant name of Alsatia, a name borrowed from the debatable land between France and Germany and had at this time and for nearly a century after, the privilege of sanctuary, unless against the writ of the Lord Chief Justice or Privy Council. King James I confirmed this privilege, it is said, by his charter in 1608. There is an interesting account of Alsatia in the Introduction to Inderwick's Calendar of the Inner Temple.

In Nigel's flight he is assisted by Lowestoffe, a young Templar, chiefly distinguished by his performances on the French horn, so annoying to Counsellor Barratter, who occupied the chambers beneath. The desperadoes and vagabonds of Alsatia, living without the pale, had a semi-organized government of their own which Scott minutely describes. Nigel lodges with old Trapbois who steals the King's warrant from him, and is then murdered by an outlaw in an attempt to steal the King's jewels which Heriot had deposited with the usurer. Martha, Trapbois' daughter, however, escapes with and marries Richie Moniplies Nigel's servant, taking with her all Trapbois' money, the jewels and the royal warrant. Nigel is sent to the Tower on a charge of treason and the King takes this opportune time to tender Heriot the amount of his loan, and demand the return of the jewels. Heriot cannot produce them and the King, after tormenting him for a while, produces the jewels which had been returned to him by Richie Moniplies. It then turns out that Dalgarno had formerly deceived the Lady Hermione by a mock marriage, and the fraud being discovered, is compelled to marry her legally. This done, he claims title to her property including the mortgage which, how-

ever, Richie pays off on the last day with the old miser's money, returns the royal warrant to the King, and presents Nigel, on the latter's wedding day, with the title deeds of his estate.

In *Peveril of the Peak*, the two Peverils are accused of complicity in the notorious Popish plot. The account of Julian's arrest and examination before Justice Maulestret, shows in an interesting manner the terror which pervaded the community at the time. Julian is committed to Newgate and afterwards we find him in the Tower with his father; whence they are soon taken to their trial before the infamous Lord Chief Justice Scroggs. Dr. Titus Oates was the chief witness for the Crown, and Scott's narrative of the trial shows that he had studied the history of the times and the State Trials. Fortunately for the Peverils, Oates was now becoming unpopular and Scroggs, by the private connivance of Charles II, charged in favor of the Peverils who were acquitted.

Readers of *Peveril* will also remember the trial and execution of William Christian, in the Isle of Man, who had incurred the enmity of the Countess of Derby, the island belonging at that time to the Earldom; but the limitations of this paper do not permit more than this passing reference.

Scott alludes, also, to the tenures by which real estate was held in Man. Scott states that the transfer of land was made in open court where the grantor delivered to the grantee a straw as evidence of title. Pollock & Maitland II, 184, refer to a similar custom in some parts of England. Citing Coke 4 Inst. cap. 69, Scott suggests that "stipulation" is derived from such a *traditio stipulae* or delivery of a straw, a fanciful etymology perhaps, but very much older than Coke.

In the story the Countess of Derby purchased the girl Fenella from her master, a rope dancer, or montebank, to whom she had been apprenticed, and Scott supports the

incident by the case of *Reid v. Scott of Harden*, Fountain-hall Vol. I. p. 441, (1687), where Reid, who had bought a dancing girl from her mother for about twelve dollars, sued Scott with whom the girl had taken refuge. The Court quoted the law of Moses, held that there were no slaves in Scotland, that mothers could not sell their bairns and dismissed the case. Scott adds with pride that he was directly descended of the father of this champion of humanity.

The mainspring of the plot of *Quentin Durward*, to use Scott's own words, "is that which all who know the least of the feudal system can easily understand. The right of a feudal superior was in nothing more universally acknowledged than in his power to interfere in the marriage of a female vassal." In the story the young and beautiful Countess Isabella of Croye, a vassal of the Duke of Burgundy, invokes the protection of King Louis XI, as lord paramount. Her romantic adventures, perils and tribulations, and her safe and happy deliverance, through the bravery of Quentin, however thrilling, are many leagues distant from the subject of this paper.

Readers of that entertaining story, *St. Ronan's Well* may remember the managing committee of that health resort; the Man of Religion, the Man of Mirth, the Man of Peace, Captain MacTurk; the Man of Medicine, Dr. Quackleben; and the Man of Law, Saunders Meiklewham. The lawyer's nose projected from the front of his broad, vulgar face, like the style of an old sundial, twisted all of one side. He was on excellent terms with Dr. Quackleben, who always recommended him to make the wills of his patients—a prudent measure, as the Doctor's method was always to "give the disease its own way at first and then watch the turn of the tide," and he used to say that "robust health was a very alarming state as most sudden deaths happen to people in that condition."

The plot of the story turns upon the will of Lord Etherington's uncle, Scrogie Mowbray, settling the estate upon Etherington on condition that he should, before attaining the age of 25, marry a young lady of the name of Mowbray, and by preference of the house of St. Ronan's, with limitation over. Clara Mowbray answering to this description was engaged to Francis Tyrrel, half brother to Lord Etherington, who thereupon arranged a private marriage ceremony in which he personated Francis. The fraud was almost immediately detected and Clara returned to her home. The validity of the marriage became, naturally a grave question, which Scott solves in rather a clumsy fashion, by killing off the principals instead of obtaining a commonplace decree of the court annulling the marriage, which a lawyer of his attainments might surely have done.

The comedy parts of the novel are sustained by the great Meg Dods and her lawyer, Mr. Bindloose, who was also Sheriff Clerk. Meg consults him professionally and he thinks she intends to write her will which he says is the act of a careful and of a Christian woman. "Oh! it's an awful thing to die intestate if we had grace to consider it"—a survival of the ancient belief as to the danger to the soul of one dying without remembering the Church. But Bindloose was mistaken, for Meg came to report the disappearance of Francis Tyrrel and her fear that he had been murdered, with which theory Bindloose disagreed. "Be reasonable," said he, "consider that there is no *corpus delicti*"—"Corpus delicti? and what's that?" said Meg, "something to be paid for, nae doubt for your hard words a' end in that; and what for suld I no have a *Corpus delicti* or a *Habeas Corpus* or any other corpus that I like, sae lang as I am willing to lick and lay down the ready siller?" The lawyer explains that there was no proof that the man had been slain, and no production of his dead body. "And that is what we call the corpus

delicti." "Weel then, the deil lick it out of ye," said Meg rising in wrath and bringing the consultation to an end by calling her counsellor an old fool.

There is probably none of Scott's novels which contains more legal terms and allusions than *Redgauntlet*, and this is particularly interesting to the lawyer, by reason of the *cause celebre* of Peebles vs. Planestanes (Anglice Pebbles vs. Pavement) which supplies the comedy part of the story.

Scott drew Alan Fairford from his own experience, and Peter Peebles "that dreadful piece of realism," says Stevenson, was also drawn from life; called Poor Peter because a suitor *in forma pauperis*, a wornout litigant, half crazed by fifteen years' experience in the Courts, with a new solicitor every year—he wished he had a new coat as regularly—broken down with poverty and drink, the laughing stock of the Courts and yet proud of his notoriety, as the best known litigant in Edinburgh. When asked for his occupation he said, "If I am laird of naethin else I am aye a dominus litis" i. e. Laird of a lawsuit.

Now, as soon as Alan had given his "bit chack of dinner" and had put on his advocate's gown, old Fairford plunged his son into this whirlpool of a suit with the encouraging remark that the young advocate was like the young doctor, who must walk the hospitals and cure Lazarus of his sores before he could be admitted to prescribe for Dives when he has an indigestion. So Fairford coolly tells Alan that he must argue the case on appeal upon the Tuesday following, and overrules his objection that his inexperience would be fatal. "Ye cannot spoil it Alan," said he, "that is the very cream of the business; there have been ten or a dozen agents concerned and the case is come to that pass that Stair or Arniston could not mend it, and I do not think even you, Alan, could do it much harm." Young Domtoustie of that Ilk, had been appointed by the court to represent the pauper

suitor, and was so alarmed by the prospect that he fled the town, so Alan is forced to take his place. The case was an action for an account between former partners with a cross action and divers complications of Scots law, including that mysterious process called a multiplepounding which Peebles himself swore, by the Regiam Majestatem! was the safest *remedium juris* of all, as it might even be conjoined with a declarator of marriage. Scott in a note says that Multiplepounding is equivalent to what is called, in England, Double Distress, which to the common lawyer, explains the obscure by the unknown, for double distress is itself a Scotch term for two competing executions. Peebles claimed there was not a lawyer in England that kend the nature of a multiplepounding, but this creature of the law seems almost, if not exactly our familiar friend, Interpleader Bill, disguised in Highland plaid and breeks.

To add to Peter's glory, he had the good luck to provoke Planestones to pull his nose at the very threshold of the Court, and claimed this was not a mere assault, but constituted Hamesucken, the essence of which is to strike a man in his own home, for in truth the Court might be said to be Peter's dwelling place.

It would be too long to tell the history of this famous case, how Alan at the very moment of success, hurries away from the court room to succor his friend Latimer, how the case is remitted to an accountant to report, and how the angry Peebles serves both the Fairfords, as solicitor and advocate, with a complaint for malversation in office. He pursues Alan over Scotland and into England, demanding a "fugie warrant" of arrest to bring him back. When Justice Foxley asks him if he will take oath that Alan was a runaway apprentice: "Sir," said Peter, "I will make oath of anything in reason, when a case comes to my oath, it is a won cause. All's fair when it comes to an oath *ad litem*." But the whole book is

flavored with the case, and it must be read as a whole to be appreciated.

We must pass over, with a mere reference, other passages in *Redgauntlet*, written as only a lawyer could write them; such as the law relative to the salmon fishing with nets in the Solway, as practiced by Geddes the Quaker, and the application of the law of riot to those who forcibly destroyed them; the differences between the laws of Scotland and England, by which it resulted that Darsie Latimer (or Redgauntlet) while safe in Scotland, was subject in England, where he had property, to his uncle, and guardian, Hugh Redgauntlet; the hearing of Latimer before Squire Foxley, who complained that he was expected to carry the whole law of England in his head and a *posse comitatus* to execute it in his pocket; the smuggling cases to which Scott alludes, as coming before his court in Selkirkshire; and finally the tradition that at the coronation of George III, the solemn challenge of Dymock the hereditary champion, who flung down his gauntlet as the gage of battle, was accepted by an unknown woman, whom Scott for the sake of the story identifies as Lilius Redgauntlet, the romantic Green Mantle of the story—all these things and many more, may be read in this interesting novel, as reference being thereunto had may more fully and at large appear.

The story of *The Betrothed* was suggested to Scott by the poem of the Noble Moringer, which he had translated from the German many years before, and this was founded upon that wholesome rule of the law that no man should stay away from home for seven years, without writing a letter to his wife to let her know that he is still *in esse*. For if, after seven years' absence, he casually turns up at the old homestead, he must not be surprised if he finds that his domestic affairs are not exactly as he left them. The Noble Moringer leaves his lady to go on pilgrimage and pledges her to wait for his return seven

years with a day added for good measure. The time fairly flew; the Moringer never thought of writing home, and the last day came when the Moringer is warned in a dream of what is going on at home, and when he wakes, he finds himself by the kindly aid of St Thomas, conveniently near his own castle. In pilgrim garb and unrecognized, he joins in the wedding festivities and drops his wedding ring in his wife's cup.

The ring hath caught the Lady's eye, she views it close and near,  
Then might you hear her shriek aloud, "The Moringer is here!"  
Then might you see her start from seat, while tears in torrent fell,  
But whether 'twas for joy or woe, the ladies best can tell.  
"Yes, here I claim the praise" she said, "to constant matrons due,  
Who keep the troth that they have plight, so steadfastly and true;  
For count the term howe'er you will, so that you count aright,  
Seven twelvemonths and a day are out when bells toll twelve to-night."

The Bigamy act of 1 Jac. I, c xi, excepted from its penalties those who married a second time when the first husband (or wife) had been beyond seas for seven years—and Tennyson should have referred to this in his poem of "Enoch Arden," where Mrs. Arden waits over ten years for Enoch to come back. Very likely neither Mrs. Arden or Tennyson, himself, knew the law on the subject. Poets should always study law, as Scott did, but if more of them did so, there would be less poetry written.

The Supreme Court of Pennsylvania, in the very recent case of McCausland's estate, 213 Penna. 189, has applied this rule of seven years' absence in an ingenious manner, worthy of observation.

The Act of June 24, 1885, P. L. 155, has gone further. A seven years' wanderer is liable on his return not merely to find his wife married again, but his estate administered as though he were dead. It has been said that this Act went further. For whatever views may be entertained as to the sanctity of the marriage bond all persons are singularly unanimous in maintaining their rights of



property. Naturally the operation of this statute met with opposition. In the celebrated case of *Cunnius v. Reading School District*, 21 Pa. Sup. Court 340; 206 Penna. 469; 198 U. S. 458; its constitutionality was tested in all the judicial laboratories and came out pure gold.

It has been often stated that this rule of the presumption of death from seven years' absence, is of common law origin. Such is or was the general impression, but see notable matter hereof in the exposition of Professor Thayer in his classical work on Evidence, whereof, as Lord Coke would say, you may disport yourselves for a time. He concludes that while death has always been inferred from long absence, the establishment of the seven year period has been quite modern.

In the short story of *The Two Drovers*, Scott gives us a tragedy from life. Robin having in a fit of vengeful passion, killed his friend, Harry Wakefield, was tried for his murder, and Scott, who happened to be present at the trial, which took place in Carlisle, made a very powerful story of it. He narrates in particular, the Judge's charge, dwelling on the fact that two hours elapsed between the injury received by the prisoner and his fatal retaliation, thus showing the prisoner's deliberate intent. The Highlander condemned to death, acknowledged the justice of his sentence, expressing, with unconscious rhythm the old *Lex Talionis*—"I give a life for the life I took and what can I do more?"

In *The Talisman* Scott refers to the Assize of Jerusalem, that compendium of feudal law compiled for the government of the Kingdom of Palestine when conquered from the Saracens. As an instance of the attachment of the Frankish invaders to their feudal customs it is also said that Richard I tried to import the Forest laws into Palestine.

Readers of the novel will remember that Conrade of

Montserrat stole from its place the banner of England and was detected by the sagacity of Roswal the hound. Richard thereupon charged Montserrat with the offence. "Murders and robbers have been convicted," said he to the King of France, "and suffered death under such evidence, and men have said that the finger of God was in it. In thine own land, royal brother, and upon such an occasion, the matter was tried by a solemn duel betwixt the dog and the man, as appellant and defendant, in a challenge of murder. The dog was victorious, the man was punished, and the crime was confessed." Scott probably referred to the celebrated case of the Dog of Montargis; but this incident is supposed to have taken place about 1371, so that a reference to it by King Richard is a clear anachronism, though excusable enough in the circumstances. Scott describes in detail, as he loved to do, the judicial combat which ensued between Sir Kenneth, as champion of King Richard, and Conrade of Montserrat, who is defeated and confesses his treason.

The dramatic crisis of the *Fair Maid of Perth* is the ordeal of Bier right for the detection of the murderer of Oliver Proudpute. This ancient method of trial was founded on the belief that at the touch or even approach of the murderer, the body of his victim would bleed afresh. Scott refers to it in his ballad of *Earl Richard*:

"The maiden touched that clay cauld corpse  
A drap it never bled,  
The ladye laid her hand on him  
And soon the ground was red."

This sort of evidence seems to have been recognized in Scottish jurisprudence, at least in the Auchindrane case, on which Scott founded his dramatic poem of *Auchindrane*, the corpse bled at the approach of the murderer's innocent daughter, and the phenomenon naturally attracted attention. As late as 1688 in the High Court of Justiciary at Edinburgh in the Stands-

field case, Philip Standsfield, suspected of having murdered his father, touched the body, when the blood instantly gushed forth, which circumstance was included in the libel or indictment against him. The case is quite fully reported in 11 State Trials 1371 and there are some remarks concerning it in Scott's Chronological notes of Scottish affairs from the Diary of Lord Fountainhall. Henry C. Lea examines the subject learnedly in "Superstition and Force" and even states that in Pennsylvania in 1833, evidence of this kind was allowed to go to the jury. The writer remembers that according to the newspaper reports of a murder a few years ago in New Jersey, the relatives of the deceased made an attempt to have a suspected prisoner touch the body, and Mr. Lea refers to some similar cases. Scott makes a very skillful use of this superstition in the *Fair Maid*, and his description of the ordeal in the Church of St. John is well done. Magdalen Proudfoot, the wife of the murdered man, appeals Sir John Ramorny for the murder of her husband by him or one of his household. One by one they pass by the bier and make the sign of the cross on the dead man's breast. When it comes to the turn of Bonthron, the real murderer, he declines the ordeal, and demands as he had a right, the judicial combat, which is accepted by Smith, the widow's champion. The combat is minutely described, and Smith defeats Bonthron, who is condemned to be hung.

Scott utilizes in his story the feud between two powerful clans who, animated by the *perfervidum ingenium Scotorum*, seemed bent on mutual extermination. It was finally agreed to terminate the quarrel in a quasi-judicial manner by a battle between thirty champions on each side, which was actually fought in 1396, before King Robert III, and the whole court of Scotland, and to give greater eclat to the performance, it was reserved for Palm Sunday. They were lusty champions, true to their

word, especially when they threatened revenge. Simon Glover remarked of the Highland chief Gilchrist—"saving that he is hasty in homicide, I have nowhere seen a man who walketh a more just and upright path." This combat between the clans Chattan and Kay, is examined at length by George Neilson in his *Trial by Combat*.

Scott also alludes to the power of the magistrates of Perth to execute, without trial, a person taken red-handed, according to what was called Jedwood justice—"hang in haste and try at leisure," something like the more peaceful maxim of our day, "Vote first and discuss it afterwards." After this fashion, Earl Douglass hangs the murderers of the Prince, and then takes the verdict of guilty from his jury of Jedwood men.

Scott, in his introduction to the *Border Minstrelsy*, speaks also of Lydford law, a similar custom in Devonshire:—

"I oft have heard of Lydford Law,  
How in the morn they hang and draw,  
And sit in judgment after."

So that the Lynch law of our own country has a very ancient and respectable pedigree.

The scene of *Anne of Geierstein*, is laid in Switzerland and France, in the latter part of the fifteenth century, and Scott utilizes for the framework of his story, the Vehmic tribunals, which originated in Westphalia and exercised such a mysterious and potent influence. This secret and oath-bound court assumed criminal jurisdiction of the widest range. Thieves and murderers caught in the act were executed without trial and without delay by Judge Lynch's cousin German. Other offenders, including those who committed any act alleged to offend against honor or religion, or even dared to defy the authority of the Holy Vehme, were arrested, subjected to rigorous and inquisitorial examination, tried and if found guilty, executed by a tribunal, the very members

of which were often unknown to one another. In his Introduction, Scott quotes from Palgrave's English Commonwealth an account of the origin and method of this peculiar court which is stated to be a survival from pagan times, and connected with the ancient Saxon religion. The subject had long interested Scott. He made it the subject of his dramas, *The House of Aspen* and *Goetz of Berlichingen* which he had translated from Goethe in 1799, and thirty years after, he returned to it in *Anne of Geierstein*. Andrew D. White in his recent autobiography says that he was incited to the study of history by reading *Quentin Durward* and *Anne of Geierstein*.

In *The Surgeon's Daughter* Scott introduces Mr. Lawford, the town clerk, a man of sense and humanity, as well as law. Mr. Gray, the surgeon, calls for his aid when the Jewess, Lilia, is about to be arrested for treason. Despite her illness and danger of death, Mr. Lawford admits that the warrant must be executed, "for these evils," he says, "are only contingent, not direct and immediate consequences." He plumes himself not a little on his knowledge of law and of the world, thanked the Lord that they had nothing to do with English practice on this side of the Border, and speaks a word in favor of the Jews—"They are well attached to Government; they hate the Pope, the Devil and the Pretender as much as any honest man among ourselves." To which the Surgeon replied that he could not admire either of those three gentlemen.

In conclusion, the object of this paper has been to show how Scott's legal learning and training influenced his writings; perhaps this object has been accomplished, although of necessity much has been omitted for want of space, as any student of Scott's writings may readily perceive. It is difficult to keep the straight path of our subject, while reading those brilliant novels, so stirring in narrative, so humorous in dialogue, so interesting in

historical allusions, so absorbing in their plots. They swarm with life. What characters has Scott created! Caleb Balderston, Jonathan Oldbuck, Peter Peebles, Nicol Jarvie, Dugald Dalgetty, Meg Merrilies, Jeanie Deans, Meg Dods, Diana Vernon, and Rebecca—the female faction is well represented—and there are many more. By the Regiam Majestatem! these are real people, they are living now, and will live forever. To read Scott is almost enough to make any man willing to be a Scotchman, quite enough to thrill those of us in whose veins runs Scottish blood, and much more than enough to make all of us lawyers feel proud that this Scott was a lawyer. What a wonderful world does this Wizard of the North show us as we gaze into his magic drop of ink! Princes and peasants; cavaliers and covenanters, priests and puritans, lords and ladies gay, monks and maidens on their palfreys white, the moated castles and the dungeons deep, the knights of long ago with “many a crest that is famous in story,” and heralds “red and blue and green with all their trumpery.” And as the vision fades we can almost hear the soft Scotch melodies, now merry, now mournful, echoing from the Northern hills, while the poet sings:—

“Harp of the North, farewell! The hills grow dark,  
On purple peaks a deeper shade descending;  
In twilight copse the glow-worm lights her spark,  
The deer, half seen, are to the covert wending.  
Hark! as my lingering footsteps slow retire,  
Some spirit of the Air has waked thy string!  
'Tis now a seraph bold, with touch of fire,  
'Tis now the brush of Fairy's frolic wing.  
Receding now, the dying numbers ring,  
Fainter and fainter down the rugged dell,  
And now the mountain breezes scarcely bring  
A wandering watch note of the distant spell—  
And now, 'tis silent all! Enchantress, fare thee well!

*John Marshall Gest.*